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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 23

B. A. REYNOLDS, ET AL., APPELLANTS

v.

M. O. SIMS, ET AL.

No. 27

DAVID J. VANN AND ROBERT S. VANCE, APPELLANTS

v.

AGNES BAGGETT, SECRETARY OF STATE OF THE STATE OF ALABAMA, ET AL.

No. 41

JOHN W. McCONNELL, JR., ET AL., APPELLANTS

v.

AGNES BAGGETT, SECRETARY OF STATE OF THE STATE OF ALABAMA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the three-judge district court (R. 137–167) is not yet reported. A prior opinion of the three-judge district court (R. 62–65) is reported at 205 F. Supp. 245.

JURISDICTION

The judgment of the three-judge district court was entered on July 25, 1962 (R. 173). Notices of appeal and cross-appeal to this Court were filed on August 17 and August 23, 1962, and probable jurisdiction was noted on June 10, 1963 (R. 197–200, 201–203, 204–205, 206). The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the preexisting apportionment of both houses of the Alabama legislature violates the equal protection clause of the Fourteenth Amendment by creating gross inequalities in *per capita* representation without rhyme or reason.

2. Whether the district court properly held that the plaintiffs' constitutional rights would also be violated by the apportionments provided by a proposed constitutional amendment, and by standby legislation which was to take effect upon failure of the amendment.

3. Whether the district court abused its discretion in ordering a temporary apportionment combining the most equitable provisions of the proposed amendment and the standby legislation, in order to allow the legislature to reapportion itself.

CONSTITUTIONAL PROVISIONS, STATUTES, AND PROPOSED CONSTITUTIONAL AMENDMENT INVOLVED

Article IV, Section 50, of the 1901 Alabama Constitution is set forth in the Appendix, p. 49. Article IX, Sections 197–201, of the 1901 Alabama Constitution is set forth in the Appendix, pp. 49–50. Article XVIII, Section 284, of the 1901 Alabama Constitution is set forth in the Appendix, pp. 50–51. Sections 1 and 2 of 32 Alabama Code (1958) are set forth in the Appendix, pp. 51–52.

Proposed Constitutional Amendment No. 1 of 1962, Alabama Senate Bill No. 29, Special Session, 1962 (the so-called "67-Senator Amendment"), is set forth in the Appendix, pp. 52–54. The Alabama Reapportionment Act of 1962, Alabam House Bill No. 59, Special Session, 1962 (the "Crawford-Webb Act") is set forth in the Appendix, pp. 54–56.

INTEREST OF THE UNITED STATES

This is one of four cases pending argument on the merits in which the Court will be called upon to formulate under the Fourteenth Amendment the constitutional principles applicable to challenges to malapportionment of a State legislature. The United States has filed its principal brief in *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, because of an earlier due date. There we attempted to present a compendious analysis applicable to all four cases showing their relation to each other. The instant case raises specific problems in the application of those principles.

STATEMENT

1. *The Complaint.*—On August 26, 1961, the plaintiffs (the appellees in No. 23)[1]—fourteen citizens and taxpayers of the United States and of the State of Alabama, who are residents and registered voters of Jefferson County, Alabama—filed a complaint in the United States District Court for the Middle District of Alabama, in their own behalf and on behalf of all voters of Alabama who are similarly situated, challenging the apportionment of the Alabama legislature (R. 1–39). The defendants (the appellants in No. 23), who were sued in their representative capacities as officials charged with the performance of duties in connection with State elections, included the Secretary of State and the Attorney General of Alabama; the Chairmen and Secretaries of the Alabama State Democratic Executive Committee and the Republican Executive Committee; and three Judges of Probate of three counties as representatives of all the probate judges of Alabama (R. 1, 3–8). The complaint alleged deprivation of rights under the Alabama Constitution and under the equal protection clause of the Fourteenth Amendment, and asserted that the district court had jurisdiction under the Civil Rights Act. 42 U.S.C. 1983 and 1988, as well as 28 U.S.C. 1343 (R. 2, 8–14).

The complaint stated that the Alabama legislature consisted of a House of Representatives of 106 members and a Senate of 35 members.[2] It set out (R. 13–

[1] Two groups of intervenor-plaintiffs (see p. 8 below) are cross-appellants in Nos. 27 and 41.

[2] Article IV, Section 50, of the Alabama Constitution (Appendix, p. 49) provides that the Legislature shall consist of not

14; Appendix, pp. 49–50) relevant portions of Article IX of the Alabama Constitution of 1901 which provide that "[t]he members of the House of Representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States * * *"; that the Senate districts "shall be as nearly equal to each other in the number of inhabitants as may be * * *"; that "[r]epresentation in the Legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments"; that it is the duty of the legislature to reapportion after each census; that each county (there are now 67) is entitled to at least one member of the House of Representatives; and that each Senate district shall have only one member and no county may be divided between two Senate districts (thereby placing a limit of one Senator for any county).[3]

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more than 35 senators and 105 representatives, except that, in addition to the 105 members, each county thereafter created shall be entitled to one representative. The House increased by one member in 1903 when Houston County was created out of Dale, Geneva and Henry Counties (R. 166). Houston County was joined to Henry County to form the thirty-fifth senatorial district, which up to 1903 consisted only of Henry County (R. 17).

Article IX, Sections 202 and 203, of the Constitution, which was based on the 1900 census, established the precise senatorial and representative districts of the State until a new reapportionment was made by the legislature. Sections 202 and 203, as modified by the creation of Houston County in 1903, were enacted into the Alabama Code of 1907 and 1923, and were re-enacted as 32 Alabama Code (1958) 1, 2.

[3] The cross-appellants in No. 27 (Br. 15–16) say that the Alabama Constitution forbids the division of a county only

The complaint alleged that the last apportionment of the Alabama Legislature was based on the 1900 federal census despite the requirement of the Alabama Constitution that the legislature be reapportioned every ten years; and that, since the population growth of the various counties in the State from 1900 to 1960 had been uneven, Jefferson and other counties were now victims of serious discrimination (R. 18–20, 35–39). As a result of the failure of the legislature to reapportion itself, plaintiffs asserted that they were denied "equal suffrage in free and equal elections * * * and the equal protection of the laws" in violation of the Alabama Constitution and the Fourteenth Amendment to the Federal Constitution (R. 8–9).

Plaintiffs also claimed that they had no adequate remedy at law, and that they had exhausted all forms of relief other than that which might be available to them through the federal courts. They asserted that the legislature had established a pattern of conduct from 1911 to the present time which "clearly demonstrates that no reapportionment * * * shall be ef-

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when one or both pieces will be joined with another county to form a multi-county district, *i.e.*, counties entitled by population to two or more senators can be split into the appropriate number of districts. The argument is based on the fact that prior to the Constitution of 1901, the Alabama Constitution so provided. Appellants say that there is no reason to believe that the 1901 Constitution was intended to effect any change. However, this view seems contrary to the words of Article IX, Section 200, of the Alabama Constitution and to the practice under it. The only apportionments under the 1901 Constitution, the 1901 apportionment and the Crawford-Webb Act (see pp. 11–12, 54–56 below), gave no more than one seat to a county even though by population several would have been entitled to more.

fected"; that representation at any future constitutional convention would be established by the legislature, a fact which would make it "extremely unlikely" that the membership of any such constitutional convention would differ from that of the legislature; and that, while the Alabama Supreme Court had ruled that the legislature had not complied with the Alabama Constitution, the court nevertheless held that it would not interfere with the question of reapportionment[4] (R. 20–21).

Plaintiffs requested the convocation of a three-judge district court under 28 U.S.C. 2281. They sought: (1) a declaratory judgment that Article IX, Sections 202 and 203 of the Alabama Constitution and 32 Alabama Code 1, 2, which establish the present apportionment of the legislature, are unconstitutional under the Alabama Constitution and the due process and equal protection clauses of the Fourteenth Amendment; (2) an injunction enjoining the defendants from executing their duties in connection with elections of the legislature until such time as the legislature reapportions itself in accordance with the Alabama Constitution; (3) a mandatory injunction (until such time as the legislature properly reapportions) requiring the defendants to conduct the 1962 general election at large over the whole State; and (4) any other relief which "may seem just, equitable and proper" (R. 25–33).

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[4] *Waid* v. *Pool*, 255 Ala. 441, 51 So. 2d 869; *Ex parte Rice*, 143 So. 2d 848 (Ala. Sup. Ct.); *Opinion of the Justices*, 254 Ala. 185, 47 So. 2d 714; *Opinion of the Justices*, 263 Ala. 158, 81 So. 2d 881.

2. *The Pre-decision Proceedings in the District Court.*—A three-judge district court was convened to hear and determine the cause. Three groups of citizens, taxpayers and qualified voters of Alabama and the Counties of Jefferson, Mobile, and Etowah, were granted leave to intervene in the action as intervenor-plaintiffs; two of the groups are cross-appellants in Nos. 27 and 41 (R. 47, 65–66, 76–77). With minor exceptions, all the intervenors adopted the allegations and prayers of the plaintiffs' amended complaint (R. 46, 60–61, 69).

On March 29, 1962 (three days after this Court had decided *Baker* v. *Carr*, 369 U.S. 186), the plaintiffs moved for a preliminary injunction requiring the defendants to conduct at large the May 1962 Democratic primary elections and the November 1962 general elections of the legislature (R. 47–50). The motion was set for hearing by the three-judge court in an order which stated the court's tentative view upon two points: (1) that an injunction was not required before the primary elections of May 1962 to protect plaintiffs' constitutional rights; and (2) that no action should be taken by the court, which is not "absolutely essential" for the protection of asserted constitutional rights, before the Alabama Legislature has had "further reasonable but prompt opportunity to comply with its duty" under the Alabama Constitution (R. 57–59).

On April 14, 1962, the court, after reiterating the views expressed in the order of March 30, 1962, re-set the case for hearing on July 16 (R. 62–63). The

court noted that the importance of the case, together with the necessity for effective action within a limited period of time, required an early announcement of its views. The court then indicated (1) that, under *Baker* v. *Carr,* 369 U.S. 186, it had jurisdiction of the cause, the complaint stated a justiciable cause of action, and the plaintiffs had standing to bring the suit; (2) that it was taking judicial notice of facts which were "well known" to the Justices of the Supreme Court of Alabama and the people of Alabama—that there had been population changes in the counties of Alabama since 1901, that the present representation of the Alabama Legislature as provided for in 32 Alabama Code 1 and 2 is not on a population basis, and that the legislature had never reapportioned its membership as required by the Alabama Constitution; (3) that if the legislature complied with the provision of the Alabama Constitution (Art. XVIII, Sec. 284) that "Representation in the legislature shall be based upon population," there could be no valid objection on federal constitutional grounds to any such apportionment and the complaint in the instant case would be dismissed; (4) that if the legislature failed to act, or its actions did not meet constitutional standards, the court would be under a "clear duty" to take some action on the matter before the general elections of November 1962 (action which it said should be kept to the minimum necessary for the guaranteeing of constitutional rights to Alabama citizens); (5) that, to such an end, the "present thinking" of the court was for adherence to

the plan suggested by Mr. Justice Clark in his concurring opinion in *Baker* v. *Carr*—that is, awarding seats released by the consolidation or revamping of existing districts to counties suffering the most "egregious discrimination," thereby releasing the stranglehold on the legislature sufficient to permit it to reapportion itself; and (6) that, while retaining jurisdiction, the court would defer further action in the case until the newly elected legislature had "full opportunity" to reapportion itself, which would permit the dismissal of the case (R. 62–65).

On July 2, 1962, Judge Johnson permitted the plaintiffs to amend their complaint to add a further prayer for relief (R. 76). The plaintiffs requested that, since the legislature (which was assembled in special session) "appears to be giving no serious consideration to any act reapportioning the House of Representatives and redistricting the Senate * * * on a population basis prior to the November, 1962, general election" in accordance with the court's opinion of April 14, 1962, the court provisionally reapportion the House of Representatives and the Senate. The plaintiffs asked that the court consolidate existing election districts and distribute the seats thus released to those counties suffering the most "egregious discrimination" so that the stranglehold on the legislature would be relaxed enough to permit it to reapportion its membership. The plaintiffs then suggested that the court defer further action until the newly elected legislature had full opportunity to reapportion its membership in accordance with the Ala-

bama Constitution; and that the court enjoin the defendants from performing their election duties except in accordance with the provisional plan of reapportionment (R. 69–70).[5]

On July 12, 1962, an extraordinary session of the Alabama Legislature advanced two reapportionment plans to take effect in 1966. One was a proposed constitutional amendment, called the "67-Senator Amendment" (see Appendix, pp. 52–54). It provided for a House of Representatives consisting of 106 members apportioned by giving one seat to each of the 67 counties and distributing the others according to population by the "equal proportions" method. Using this formula, the constitutional amendment specified the number of representatives for each county until a new apportionment could be made on the basis of the 1970 census. The Senate would be composed of 67 members, one from each county. The act provided that the proposed amendment should be submitted to the voters for ratification at the general election of November 1962.

The "Crawford-Webb Act" (see Appendix, pp. 54–56), was enacted as standby legislation to take effect in 1966 if the proposed constitutional amendment should fail.[6] The act provides that the Senate should

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[5] Intervenors Vann and Vance (cross-appellants in No. 27) had previously asked for similar relief (R. 60–61).

[6] The Act itself merely says that it will take effect in 1966. However, the proposed constitutional amendment also provides that it will take effect in 1966. The amendment would take precedence if it was adopted by the voters and not held unconstitutional. As the district court stated, the Act is a stand-by

consist of 35 members representing 35 senatorial districts, established along county lines. The act altered 10 out of the former 35 districts (compare R. 35–36 with Appendix, pp. 54–55). As for the House of Representatives, the statute apportions the representatives among the counties as follows: Jefferson, 12 members; Mobile, 6 members; Montgomery, 4 members; Calhoun, Etowah, Madison, and Tuscaloosa, 3 members each; Baldwin, Colbert, Cullman, Dallas, Houston, Lauderdale, Lee, Marshall, Morgan, Russell, Talladega, and Walker, 2 members each; and all the remaining counties, 1 member each (R. 113, 161).[7] The Crawford-Webb Act also provides that it shall be effective "until the legislature is reapportioned according to law," but it provides no standard for such a reapportionment.[8]

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measure designed to take effect in the event that the voters rejected the "67-Senator Amendment" or the federal courts refused to accept the proposed amendment as effective action complying with the Fourteenth Amendment (see R. 143–144).

[7] While no formula for this apportionment is stated, one can be extrapolated (see the Brief for Appellants, B. A. Reynolds, *et al.*, p. 39): each county with less than 45,000 people receives one representative; counties with 45,000 to 90,000 people, 2 seats; counties with 90,000 to 150,000 people, 3 seats; counties 150,000 to 300,000 people, 4 seats; counties with 300,000 to 600,000 people, 6 seats; counties with over 600,000 people, 12 seats.

[8] Presumably, future apportionments would be based on the existing provisions of the Alabama Constitution which the statute, unlike the proposed constitutional amendment, would not effect. The State constitutional provisions are plainly inconsistent with the statute's apportionment of both houses.

3. *The Evidence.*—The basic facts consist of two sets of incontrovertible figures: (1) the population for each county in Alabama and for each senatorial district according to the 1960 census; (2) the number of representatives apportioned to each county under each of the plans at issue—the apportionment under the 1901 statute, the proposed constitutional amendment, and the Crawford-Webb Act. Under all three plans, each senate district would be represented by one senator. Convenient compilations of these figures are found at R. 35–39 and are also attached as appendices to the opinion of the district court (R. 163–167).

4. *The Decision and Decree of the District Court.*—On July 21, 1962, the district court, relying on *Baker v. Carr,* 369 U.S. 186, held that it had jurisdiction over the cause; that the complaint alleged a justiciable cause of action; and that the plaintiffs had standing to challenge the Alabama apportionment statutes (R. 140–141). The court then ruled that the existing inequality in representation in Alabama was the result of "invidious discrimination" in violation of the equal protection clause of the Fourteenth Amendment, a finding which the court noted had been "generally conceded" by the parties to the litigation (R. 144).

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[1] Jefferson (634,864), Mobile (314,301), Montgomery (169,210), Etowah and St. Clair (122,368), Madison, (117,348), Tuscaloosa (109,047), Baldwin, Escambia, and Monroe (104,971), and Lauderdale and Limestone (98,135) (R. 35–36, 166).

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In support of this conclusion, the court referred to appendices to its opinion (R. 163–165) which showed that the growth and shifts in population between 1901 and 1960 had converted the preexisting population into a crazy-quilt utterly lacking rhyme or reason.

The court then considered the proposed constitutional amendment and the Crawford-Webb Act to ascertain whether the legislature had taken "effective action" to remedy the unconstitutionality of the existing apportionment (R. 146). The apportionment of one Senator to each county under the proposed constitutional amendment, the court held, would be "even more invidious than at present" because (1) the present control of the Senate by 25.1 percent of the people of Alabama would be reduced to 19.4 percent; (2) the 34 smallest counties, whose total population is less than that of Jefferson County, would have a majority of the total membership of the Senate; and (3) senators elected by 14 percent of the population of Alabama could prevent the submission of any future proposal to amend the State constitution (R. 148). The court noted that the "only conceivable rationalization" of the senatorial provisions is that it is based on political units within the State and is analogous to the United States Senate, but it rejected the analogy on the ground that the Alabama counties are merely involuntary political divisions of the State created by

statute to aid in the administration of government (R. 148–149).[10] The court also concluded that the proposed apportionment of the House of Representatives—one representative for each of the 67 counties with the remaining 39 distributed according to population—was "based upon reason, with a rational regard for known and accepted standards of apportionment" (R. 153).

Turning next to the Crawford-Webb Act, the district court held that an apportionment of the House of Representatives giving additional seats to the populous counties in diminishing ratio to their population (*i.e.*, 3 for 90,000 to 150,000 people and 4 for 150,000 to 300,000) was "totally unacceptable" (R. 152). Each representative from Jefferson and Mobile Counties would represent over 52,000 citizens while representatives from eight "Black Belt" counties would each represent less than 20,000 citizens (R. 153). The court regarded the apportionment of the Senate provided in the Crawford-Webb Act as but a "slight

[10] The court also noted that the proposal "may not have complied with the State Constitution" since not only does Article XVIII, Section 284, of the Alabama Constitution provide that the population basis of the Legislature "shall not be changed by constitutional amendments" but the Alabama Supreme Court had earlier indicated that Section 284 could be altered only by constitutional convention (R. 147–148). See *Opinion of the Justices*, 254 Ala. 185, 47 So. 2d 714; *Opinion of the Justices*, 263 Ala. 158, 81 So. 2d 881.

improvement over the present system of representation" since the net effect of switching a few seats from the less populous to more populous counties would merely increase the minority electing a majority of the Senate from 25.1 percent to 27.6 percent of the population (R. 152). The court pointed out that the vote of a citizen in the senatorial district consisting of Bibb and Perry Counties would be worth twenty times that of a citizen in Jefferson County; that the vote of a citizen in the six smallest districts would be worth fifteen or more times that of a citizen in Jefferson County; and that, in twenty-two districts, a citizen would have eight or more times the voting strength of a citizen in Jefferson County (R. 152). The court then held that the Crawford-Webb Act was "totally unacceptable" as a "piece of permanent legislation" which, under the Alabama Constitution (Art. IX, Sec. 198, 200), would remain in effect without alteration until the next decennial census (R. 154).

The district court then adopted as a provisional reapportionment the provisions relating to the House contained in the "67-Senator Amendment"—one seat for each county with the other 39 distributed according to population—and the provisions of the Crawford-Webb Act relating to the Senate (R. 154). The court retained jurisdiction and deferred any hearing on the plaintiffs' motion for a permanent injunction "until the Legislature, as provisionally reapportioned * * *, has an opportunity to provide for a true reapportionment of both Houses of the Alabama Legislature" (R. 155–156). The court emphasized

that its "moderate" action was designed to break the stranglehold on the legislature and would not suffice as permanent reapportionment (R. 156).

On July 25, 1962, a decree was entered in accordance with the foregoing rulings (R. 173–191).

After the district court's decision, new primary elections were held pursuant to House Bill No. 130, Special Session, 1962, which was passed at the same session as the proposed constitutional amendment and the Crawford-Webb Act, to be effective in case the district court itself ordered reapportionment. The general elections in November 1962 were likewise held on the basis of the court's apportionment. Consequently, the present Alabama legislature is apportioned according to the district court's decree.

Appeals to this Court were noted by the defendants (appellants in No. 23) and by two groups of plaintiff-intervenors (cross-appellants in Nos. 27 and 41) (R. 197–205).

ARGUMENT

INTRODUCTION AND SUMMARY

The initial question is whether the apportionment existing in Alabama prior to the district court's decision—the apportionment provided by the 1901 legislation—violated the plaintiff's rights under the Fourteenth Amendment. That was not only the apportionment in effect when the bill was filed but even on the date of the district court's decision the election officials were obliged to follow it unless prevented by the court. Furthermore, it is far from clear that either the "67-Senator Amendment" or

the Crawford-Webb Act has become effective as a matter of State law. The amendment has not been submitted to the voters. The Crawford-Webb Act was apparently intended to take effect in 1966 only if the proposed amendment was rejected by the people or held unconstitutional in a final adjudication.

We submit, for reasons stated below in more detail, that the preexisting apportionment is plainly unconstitutional as applied today whatever its validity when enacted in 1901. During the 60-year interval the passage of time and shifts in the distribution of population made the apportionment into a crazy-quilt. The resulting gross inequalities violate the equal protection clause. That proposition is plainly implied in the opinions of the prevailing Justices in *Baker* v. *Carr*, 369 U.S. 186, and is supported by a host of subsequent decisions in the lower courts.

It is unnecessary to decide whether either the "67-Senator Amendment" or the Crawford-Webb Act was properly before the district court on the merits. The proposed amendment, not having been ratified, has never become effective, and whether the Crawford-Webb Act actually came into force may be debatable as a matter of Alabama law. The question need not be decided because both measures had to be considered in formulating a remedy for the vindication of the constitutional rights which defendants were threatening to violate by adhering to the 1901 apportionment in the November election.

Having found the preexisting apportionment unconstitutional, the district court was required to provide an effective remedy. Legislative apportionment, however, is primarily a matter for the State legislatures, both because it is a State problem, within the confines of the Fourteenth Amendment, and because it involves the exercise of a wide range of legislative choice. If the legislature has plainly set forth its preference as to a substitute apportionment that satisfies the requirements of due process and equal protection, it would be an error of law to disregard the legislature's action in favor of a judicial apportionment framed by the court. Compare *Sobel* v. *Adams*, 208 F. Supp. 316, 319–322 (S.D. Fla.); *Toombs* v. *Fortson*, U.S.D.C., N.D. Ga., decided September 5, 1962 (passing on both proposed constitutional amendment and proposed statutes); *Moss* v. *Burkhart*, U.S.D.C., W.D. Okla., decided July 17, 1963 (passing on proposed statute, but declining, because it was unlikely to be adopted, to pass on proposed constitutional amendment except to say that it was of doubtful constitutionality).[11]

The "67–Senator Amendment" set forth the Alabama legislature's preference with respect to future

[11] There was considerably less warrant to consider the constitutionality of the constitutional amendments and statutes in the cases cited above than in this case. In those cases, the constitutional amendment might be rejected by the people or the statutes not passed by the legislature. Here, unless a new constitutional amendment or statute is adoped in the meantime, either the "67-Senator Amendment" or the Crawford-Webb Act would, according to their terms, be effective in 1966.

apportionment, even though it had not yet been ratified. The Crawford-Webb Act was adopted by the legislature as an alternative. Only if both were unconstitutional under the Fourteenth Amendment could the district court properly proceed to frame an interim judicial apportionment to be effective pending further legislative action.

In the second part of our Argument, therefore, we address ourselves to the apportionment proposed in the "67—Senator Amendment" and show that although it is not a crazy-quilt, being based upon intelligible principles, it is nonetheless unconstitutional because the principle of popular representation has been subordinated to the representation of political subdivisions to such an extent as to create very gross inequalities in *per capita* representation and give control of both branches of the legislature to small minorities of the people. The controlling legal principle is stated as the fourth proposition in our Maryland brief in the general analysis of the standards to be applied in implementing *Baker* v. *Carr* (pp. 46–50) and is elaborated there as applied to the Maryland apportionment (pp. 57–90). In our view, the instant case is indistinguishable. Not only are the populous counties grossly underrepresented in the Alabama legislature in comparison with other counties but senators representing as few as 19.4 percent of the people would constitute a majority of the Senate while representatives chosen by no more than 42.4 percent can control the House of Representatives.

In Point III, we take up the Crawford-Webb Act and show that it violates the same principle for essen-

tially the same reasons: the inequalities in *per capita* representation are no less gross; 27.6 percent of the people could control the Senate and 37 percent, the House. In addition, the inequalities in the proposed representation in the Senate defy rational explanation.

Finally, we turn to the issue raised by the cross-appellants—whether the district court erred in not requiring both houses of the Alabama legislature to be apportioned strictly on the basis of population. It is essential, in this field, for the courts to give the legislatures as much opportunity as possible, consistent with protecting basic constitutional rights, to make their own apportionments since this is primarily a State and legislative responsibility. In our view the district court properly gave the Alabama legislature time to act. When the legislature took inadequate action, it was proper to adhere as closely as practicable to the apportionments approved by the representatives of the people of Alabama, provided that this course offered reasonable hope that minority control would be broken sufficiently to result in an early legislative apportionment recognizing plaintiffs' constitutional rights. If the hope proves vain, the district court can provide a more complete remedy, for it recognized that its decree was only an interim measure and retained jurisdiction to grant further relief if necessary to secure the plaintiffs their full constitutional rights.[12]

[12] For the above reasons, we find it no more appropriate here than in the companion cases to consider whether substantially equal representation *per capita* is required by the Fourteenth Amendment in both branches of a State legislature.

I

THE PRE-EXISTING APPORTIONMENT OF THE ALABAMA LEGISLATURE VIOLATED THE EQUAL PROTECTION CLAUSE BECAUSE IT CREATED GROSS INEQUALITIES IN PER CAPITA REPRESENTATION WITHOUT RHYME OR REASON

The legislative apportionment in effect in Alabama prior to the institution of the present action illustrates the causes of the kind of gross malapportionment that prevailed in a number of States prior to the decision in *Baker* v. *Carr*. The apportionment act was enacted in 1901. It was based on the Alabama Constitution which provides that the Senate shall be apportioned according to population, except that no county may have more than one senator,[13] and that the House of Representatives shall be apportioned by giving one seat to each county with the remaining 39 distributed according to population. Article IX, Sec. 198, 200 (Appendix, pp. 49, 50). While these rules allowed 41 percent of the people to elect a majority of the Senate and 44 percent to elect a majority of the House even in 1901, the inequalities were at least the result of an intelligible system, whether or not it might be unconstitutional upon some other ground.

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[13] The limitation to one senator for a county results from provisions that no county may be divided in forming senatorial districts and no district may have more than one senator. Art. IX, Sec. 200 (App., p. 50). It would seem that the prohibition against dividing a county between districts might well have been read to prohibit splitting off parts of a county for combination with another county without preventing division of a county into two or more whole districts; but the State's own interpretation is to the contrary and is plainly controlling.

Since 1901, Alabama, like most States, has experienced both growth and change in the distribution of population. Instead of 1,828,697 people, there are now 3,266,740, an increase of 78 percent (R. 39). Twenty-four of the 67 counties have lost population (R. 37–39) and others have grown at different rates. Mobile County has grown over five times from 62,740 to 314,301 (R. 38). Meanwhile the legislature failed to comply with the mandate of the State constitution requiring decennial reapportionment. The result is that the apportionment became a crazy-quilt and 25.1 percent, instead of 41 percent of the people became able to elect a majority of the Senate (R. 148), and 25.7 percent, instead of 44 percent, could elect a majority of the House of Representatives.

The gross discrimination that exists today in *per capita* representation is not simply the result of the limitation of one senator to any one county or the minimum of one representative for each county. Those inequalities have at least an intelligible basis. In contrast, the discrimination resulting from shifts in population has no justification. Such discrimination is plainly unconstitutional under familiar principles. "The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law." *Goesaert* v. *Cleary*, 335 U.S. 464, 466.

In the House of Representatives, Barbour County had 35,142 people in 1901, over twice the average population per representative in the State, and therefore

was assigned two representatives. Bullock County had 31,944 people and likewise had two representatives. Baldwin County then had only 13,194 people and therefore only one representative. Today Barbour has only 24,700 people, an average of 12,350 per representative,[14] and Bullock County has only 13,462 people, or 6,731 per representative, but the population of Baldwin County has grown to 49,088. Thus, Barbour has half the population of Baldwin, and Bullock has about ¼, but both have twice the representation of Baldwin. Conversely, the voters in Barbour have four times and voters in Bullock have 7½ times the representation of voters in Baldwin.[15]

In 1901, Dallas County had 54,657 people and three representatives, *i.e.*, 18,219 per representative. Etowah then had 27,361 and two representatives, or one for each 13,681. Mobile County, in 1901, had 62,740 and three representatives, an average of 20,913 per representative. And Montgomery County had 72,047 people and four representatives, an average of 18,012 per representative. As of 1960, Dallas' population had risen merely to 56,667 or 18,889 per representative. Etowah and Mobile Counties' population, however, had soared to 96,980 and 314,301 so that they now have 48,490 and 104,767 people per representative, respectively. Montgomery's population is now 169,210 or 42,303 per representative. Thus, Dallas has three representatives

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[14] In our brief in the Maryland case, we mistakenly said that Barbour County has only 12,350 people.

[15] The population figures in this paragraph, as well as most of those in the remainder of this brief, are taken from the tables in the record at pp. 35–39.

while Etowah has two, although Etowah has over 70 percent more people. Voters in Dallas County have well over 2½ times the representation of those in Etowah. Similarly, Dallas and Mobile have the same number of representatives although Mobile has almost six times as many people. This means that voters in Dallas County have almost six times the representation of those in Mobile. In addition, Mobile, while having almost twice the population of Montgomery County, has one less representative. As a consequence, voters in Montgomery County have over 2½ times the representation of those in Mobile (although less than half the representation of those in Dallas County). And voters in Bullock County have almost 16 times the representation of those in Mobile.

Finally, the most populous county in the State, Jefferson County, has grown from 140,420 in 1901 to 634,864. Its seven representatives represent an average of 90,695 today as compared to 20,060 in 1901. As a result, voters in Jefferson County have less than 1/13 the representation of those in Bullock County and about 1/5 the representation of those in Dallas County.

These examples could easily be multiplied. It is sufficient to say that, applying Alabama's own Constitution—which gives one seat to each county and distributes the rest according to population—15 of the 30 counties with more than one seat [16] are overrepresented and six are underrepresented; thus, the vice affects 70 percent. Moreover, the two largest coun-

[16] The discrimination in favor of counties with one seat is, at least in part, because of the guarantee of one seat to each county provided by the Alabama Constitution.

ties have been deprived, without justification, of over half their representation: Jefferson has only 7 seats instead of the 17 to which it would be entitled by the formula in the State constitution, and Mobile has only 3 instead of 8. While we are of course not arguing that the violation of the State constitution constitutes a violation of the Fourteenth Amendment, the State here offers no explanation for these deviations from its own standard.

The discrimination is equally egregious in the Senate. Wilcox County, which in 1901 had 35,631 people, now has only 18,739. Yet, it has a representative all to itself. Bordering Wilcox County, is a district composed of Monroe, Baldwin, and Escambia Counties, which is the second most populous multi-county district in the State.[17] Whereas, those three counties had only 48,180 people in 1901, they now have 104,971. Consequently, voters in Wilcox County have over 5½ times the representation of those in the adjoining district. The arbitrariness of this discrimination is plain since the two districts could be made substantially more equal by either placing Monroe (with 22,372 people) in the same district as Wilcox or joining both Escambia County (with a population of 33,511) and Monroe with Wilcox.

Wilcox also adjoins Lowndes County. That county, which had 35,651 people in 1901, now has 15,417 and is the least populous senatorial district in the

[17] The more populous single-county districts result from the provisions in the Alabama Constitution limiting a county to only one senator and not from shifts of population since 1901.

State. Bordering both Wilcox and Lowndes Counties is the district composed of Butler, Conecuh, and Covington Counties which in 1901 had 58,621 people, but now has 77,953. The people in this district thus have only ⅓ the representation of those in Lowndes County. The transfer of Butler (with a population of 24,560) to the same district as Wilcox would make the two districts almost equal in population. Or, if Wilcox and Lowndes Counties were joined, the resulting district would still be one of the smallest in the State. The extra seat could be used, for example, to give Lee and Russell Counties with a total population of 96,105 a senator each. The resulting districts would have 49,754 and 46,351 people, respectively.

To take one last example, Barbour County, which had 35,152 people in 1901 but has only 24,700 today, has a senator to itself. The adjoining district, consisting of Lee and Russell Counties, now has 96,105 people in comparison to the 58,909 it had in 1901. Thus, voters in Barbour County have 3½ times the voting strength of those in the multi-county district. This discrepancy could be largely eliminated by a series of changes which would include joining Barbour to a neighboring county.

Much of the discrimination in the Senate results from the requirement of the Alabama Constitution which allows a county only one seat. Thus, Jefferson County with 634,864 people would be discriminated against even if the provisions in the State constitution were faithfully applied on the basis of present population. However, the disparities in representation

between populous counties like Jefferson and the most overrepresented counties is in part the result of the failure of the legislature to reapportion because small districts like Lowndes should be joined to neighboring districts. As a result, while voters in Lowndes County now have over 41 times the voting strength of those in Jefferson, this could be reduced by over half. Moreover, other slightly less populous counties are the victims of gross discrimination because they are joined to other counties. Etowah County has 96,980 people and yet is joined together with St. Clair, to form a senatorial district having a population of 122,368. This district is the most populous multi-county district in the State; indeed, there are only two other multi-county districts more populous than Etowah County alone. Such discrimination is utterly without justification.

An apportionment that imposes such capricious inequalities upon the people in *per capita* representation in the legislature plainly violates the Fourteenth Amendment. The equal protection clause safeguards the right to participate in the processes of self-government. See our Maryland brief pp. 28–29. "[I]t has been open to the courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action" (*Baker* v. *Carr*, 369 U.S. 186, 226).

The inequalities in Alabama's preexisting apportionment are a consequence of legislative inaction. They have no apparent basis in policy. Appellees

suggest none; on the contrary, in the district court it was virtually agreed "by all the parties that the present apportionment of both Houses of the Legislature of the State of Alabama constitutes 'invidious discrimination' in violation of the Equal Protection Clause of the Fourteenth Amendment" (R. 144). With sufficient ingenuity and willingness to overlook rough edges, one might possibly conceive a policy or combination of policies that would explain the discrimination. No such process of rationalization should be supplied in dealing with the basic democratic right to fair representation, especially where the inequalities result from failure to comply with the State's own constitution. Even in the field of economic regulation, "[d]iscriminations are not to be supported by mere fanciful conjecture." *Hartford Steam Boiler Ins. Co.* v. *Harrison*, 301 U.S. 459, 462; *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 209.

The district court was therefore correct in holding that the preexisting Alabama apportionment violated plaintiffs' constitutional rights. Accord, *Baker* v. *Carr*, 206 F. Supp. 341, 346–348 (M.D. Tenn.); *Toombs* v. *Fortson*, 205 F. Supp. 248, 254–255, 256 (N.D. Ga.); *Sobel* v. *Adams*, 208 F. Supp. 316, 323–324 (S.D. Fla.); *Thigpen* v. *Meyers*, 211 F. Supp. 826, 831 (W.D. Wash.), pending on appeal, No. 381, this Term; *Sincock* v. *Duffy*, 215 F. Supp. 169, 184 (D. Del.), pending on appeal *sub nom. Roman* v. *Sincock*, No. 307, this Term; *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E.D. Va.), pending on appeal, No. 69, this Term;

Moss v. *Burkhart*, U.S.D.C., W.D. Okla., decided July 17, 1963; *Sweeney* v. *Notte*, 183 A. 2d 296, 305 (R.I. Sup. Ct.).

II

THE APPORTIONMENT PROVIDED BY THE PROPOSED CONSTITUTIONAL AMENDMENT WOULD VIOLATE THE EQUAL PROTECTION CLAUSE BY SUBORDINATING POPULAR REPRESENTATION TO THE REPRESENTATION OF POLITICAL SUBDIVISIONS TO SUCH A DEGREE AS TO CREATE GROSS INEQUALITIES AMONG VOTERS AND GIVE CONTROL OF BOTH HOUSES OF THE LEGISLATURE TO SMALL MINORITIES OF THE PEOPLE [18]

Alabama's "67—Senator Amendment" is not subject to attack as creating a crazy-quilt of unequal representation based upon no intelligible rule. Seats in the Senate would be apportioned one to each county. Sixty-seven seats in the House would go one to each county, but the remaining 37 seats would be distributed among the counties as nearly as possible in proportion to population. The apportionment is apparently based upon a principle of corporate representation through equal political subdivisions combined, in the lower chamber, with the principle of direct popular representation. The "67—Senator Amendment" rests upon the same basis as the Maryland apportionment involved in No. 29 (disregarding the special provisions relating to the City of Baltimore).

[18] The reasons for concluding that the court below properly ruled upon the constitutionality of the "67—Senator Amendment" and the Crawford-Webb Act are discussed in the Introduction and Summary, pp. 19–20, *supra*.

Although the Fourteenth Amendment condemns an apportionment which creates capricious inequalities in *per capita* representation without rhyme or reason, a showing that seats are allocated according to some intelligible rule is not sufficient *per se* to satisfy the guarantee of equal protection. The rule of classification may not violate another specific constitutional policy or introduce differentiations that are invidious or irrelevant to any tolerable purpose of governmental organization. More important here is the necessity of weighing the degree of inequality against the policies that the *per capita* discrimination seeks to secure. Objectives that might furnish acceptable justification for smaller variations [19] become so relatively insignificant as to leave the discrimination 'arbitrary' and capricious where there are grosser inequalities in representation and a total disregard for the principle of majority rule. We submit that the "67-Senator Amendment," like the Maryland apportionment at issue in No. 29 where we discuss the applicable principles at greater length, violates the equal protection clause by subordinating popular representation to the representation of political subdivisions to such a degree as to create gross inequalities and

[19] Since the instant case, like the three companion cases, can be decided without ruling upon whether the Fourteenth Amendment requires substantially equal representation *per capita* in both houses of a State legislature, we assume here, as we have in those cases that there may be permissible objectives of legislative apportionment that would justify some departure from equality *per capita*. The assumption is made *arguendo*, reserving further judgment until the issues are presented.

give control of the legislature to representatives elected by small minorities of the people.

The facts of discrimination and resulting minority control are readily demonstrated. Appendix D to the opinion of the district court shows the wide variations in population among the 67 counties. Since each county would have one senator, there would be equally great inequalities in *per capita* representation. The disparity between the most overrepresented district (Coosa County) and the most underrepresented (Jefferson County) would be more than 59 to 1. There are five counties with a population in excess of 105,000 and eight with a population of less than 15,000; between any pair drawn from both classes the discrimination would be at least 7 to 1. The nine most populous counties (Jefferson, Mobile, Madison, Montgomery, Tuscaloosa, Etowah, Calhoun, Talladega and Dallas) which hold 50.8 percent of the population, would elect only nine of the 67 senators, or 13.4 percent—one-fourth their aliquot share.

In the House the inequalities and resulting minority control would be less objectionable but still gross. The disparity between the most overrepresented county (Coosa) and the most underrepresented (Houston) would be almost 5 to 1. The nine most populous counties, with 50.8 percent of the population, would have only 45 out of 106 seats, or 42.4 percent.

The discrimination in both houses runs in favor of the same relatively unpopulous counties and against the more populous; thus, the inequality in one house

adds to the severity of the discrimination in the other.

If one house of a State legislature is apportioned substantially in accordance with population, there may be room for variation in the other,[20] but surely there can be no justification for substantial discrimination against the same people in their *per capita* representation in both houses. In this respect there is no significant difference between the Maryland case and the present aspect of the instant controversy. Having fully presented our argument there (pp. 29–34, 43–50, 57–90), we content ourselves here with a summary.

The principles of voter equality and majority rule are too vital a part of our constitutional heritage to suppose that the Fourteenth Amendment permits the States to submerge them in the interest of recognizing equality of political subdivisions, either for its own sake or because of the collateral consequences. The founding fathers firmly believed that the State legislatures should be apportioned according to population. At the Philadelphia Convention and also in the State conventions which ratified the Constitution there was general agreement that any legislature operating directly on the people should, as a matter of fundamental fairness, be apportioned in both houses according to population. See Appendix B to our Maryland brief. Constitutional practice has also favored the principle, for although a number of State constitutions have always called for limiting the principle by some recognition of political subdivisions or a limita-

[20] Here, as in the Maryland case, we make this assumption *arguendo* because no decision upon the question is required.

tion upon the representation of a few densely populated areas, the formal rules did not then create the grave injustices, gross inequalities and rule by small minorities that they yield in Maryland and Alabama today. "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing—one person, one vote". (*Gray* v. *Sanders*, 372 U.S. 368, 381). The meaning cannot be altogether different in legislative representation.

Altogether the Court has had few cases involving the right to fair representation, its decisions under the equal protection clause in other fields make it plain that strong justification is required for any legislative classification affecting fundamental rights. For example, in *Skinner* v. *Oklahoma*, 316 U.S. 535, 541, the Court, noting that procreation is "one of the basic civil rights of man," held that "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." Earlier, in *Yick Wo.* v. *Hopkins*, 118 U.S. 356, 370, the Court made clear that voting "is regarded as a fundamental political right, because preservative of all rights."

The reason for the rule is also applicable. Discrimination in legislative representation, as the recent history of Alabama indicates, prevents effective resort to the political process which can ordinarily be expect-

ed to bring about the repeal of unjust legislation. Cf. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, Note 4.

Appellants in No. 23 suggest (Br. 14) that the "67-Senator Amendment" is constitutional by analogy to the United States Congress. However, for reasons argued in our brief in the Maryland case (pp. 73–82), there is no federal analogy to the State legislatures. The Congress reflects the mixed nature of the federal government; the House of Representatives reflects its national aspect with the States in a subordinate role, the Senate reflects the continued sovereignty and equality of the States. As the framers recognized, the State governments are no such mixture; they operate directly on the people. The counties of Alabama are mere subdivisions of the State, created by the State to carry out the functions which the State chooses to assign to them. *E.g.*, *Askew* v. *Hale County*, 54 Ala. 639, 641; *State* v. *Butler*, 225 Ala. 191, 193, 142 So. 531; *Moore* v. *Walker County*, 236 Ala. 688, 690, 185 So. 175.

The federal analogy does not apply for an additional reason. The very most the federal analogy could be supposed to show is that the upper house may deviate substantially from equality on the basis of population if the lower house is apportioned fairly. The federal House of Representatives is, in effect, apportioned by the Constitution among the States almost exactly in conformance with population. While each State is guaranteed at least one representative, only four States have less than $\frac{1}{435}$ of the population. Thus, it

takes representatives from States with almost 50 percent of the population to constitute a majority of the House.[21] In contrast, only 42.4 percent of the people of Alabama live in counties electing over half the State House of Representatives. Forty of the 67 counties have less than 1/106 of the State population. Thus, the federal analogy cannot apply, even assuming its underlying validity, because Alabama's proposed constitutional amendment does not require that either house be apportioned substantially on the basis of population.

Appellants in No. 23 also contend (Br. 36–37) that apportionment of the Senate in the proposed constitutional amendment is justified as preventing domination of the legislature by a few populous cities. If this means that Alabama simply prefers rural voters over urban, the preference plainly constitutes invidious discrimination against the populous counties. As we discuss fully in our Maryland (pp. 39–46) and New York (pp. 14–33) briefs, it is as much a denial of equal protection for a State to give voters who live in populous counties less representation than other voters as it would be to prefer or discriminate against counties with a certain percentage of Protestants, Catholics, Negroes or businessmen. Appellants' argument also fails on the facts. As they acknowledge

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[21] Unfair districting within the States, however, by the State legislatures, has resulted in having a majority of representatives elected from *districts* having only 42 percent of the population. Such unfair districting is probably unconstitutional. See the government's brief in *Wesberry* v. *Sanders*, No. 22, this Term, pp. 30–35.

(Br. 52), it takes a minimum of ten counties to make up 52 percent of the State's population. Rule by ten counties scattered over different parts of the State can hardly be described as domination of the majority by a few populous cities. Since they are scattered, there is no reason that their interests would be uniformly the same. The Court can take judicial notice that they vary in size and social and economic character as well as location. Indeed, to make up their majority, appellants have been forced to include cities with a rather small population—Oxford, 3,603, Tuscambia, 8,944 and Sheffield, 13,499.

Finally, even if some weighting might be acceptable, the argument wholly fails to justify allocating to a majority of people only ten out of 67 senators, or less than 15 percent.

III

THE APPORTIONMENT PROVIDED BY THE CRAWFORD-WEBB ACT WOULD VIOLATE THE EQUAL PROTECTION CLAUSE, FIRST, BY PRESERVING THE CRAZY-QUILT OF REPRESENTATION IN THE SENATE AND, SECOND, BY SUBORDINATING POPULAR REPRESENTATION IN THE LEGISLATURE AS A WHOLE TO THE REPRESENTATION OF POLITICAL SUBDIVISIONS TO SUCH A DEGREE AS TO CREATE GROSS INEQUALITIES AMONG VOTERS AND GIVE CONTROL TO SMALL MINORITIES OF THE PEOPLE

The Crawford-Webb Act modified the preexisting apportionment of the Alabama legislature in two respects. It made a few changes in the existing senatorial districts, such as putting less populous counties into multiple county districts and giving at least one populous county, Etowah, a senator to itself instead of

making it part of a multicounty district. The statute also reapportioned the House by assigning a specific number of seats to each county without establishing general criteria. An intelligible basis can be extrapolated from the figures, however, for the legislature, after allocating one seat per county, apparently gave one additional seat to each county with 45,000 to 90,000 people, two additional seats to each county of 90,000 to 150,000 people, three additional seats to each county with 150,000 to 300,000 people, five additional seats to counties of 300,000 to 600,000 people and eleven additional seats to counties with over 600,000 people. See Brief for the Appellants in No. 23, p. 39.[22]

Under the Crawford-Webb Act, despite the changes, the apportionment of the Senate would still create gross inequalities in *per capita* representation without rhyme or reason. Since the population of Alabama is 3,266,740, and the Act provides for 35 senators, the ratio—the population of an ideal district—is 93,335 (R. 36). That ratio cannot be achieved, however, because the Alabama Constitution, as construed by the State, prevents any one county from having more than one senator, so that the seven counties with populations in excess of 93,335 cannot receive equal *per capita* representation with the rest of the State unless

[22] Appellants in No. 23 also suggest (Br. 38–39) that the Crawford-Webb Act apportions the House according to population using the method of smallest divisors. However, they admit three deviations from the result yielded by that method which give seats that would have gone to Jefferson and Mobile Counties to other less populous counties. It seems plain, therefore, that if the legislature applied any formula it is the formula described in the text.

the constitutional restriction be held invalid. However, even if its validity be assumed, there are still 28 senators for the remaining counties, with a total population of 1,729,112, which should yield one senator for every 61,572 people. The apportionment would be based upon that figure if the legislature had conformed to the State constitution.

In fact, the Crawford-Webb Act makes no attempt to conform to any systematic rule.[23] For example, the district with Colbert, Franklin, and Marion Counties has 90,331 people; if Marion County were detached, this district would still have a population of 68,494. The adjoining district of Pickens and Lamar Counties now has a population of only 36,153. Thus, voters in the latter district have 2½ times the representation of those in the former. If Marion County were added to this district, its population would still be 57,990.

Similarly, Butler, Conecuh, and Covington Counties form a district with 77,953 people. The neighboring district of Wilcox and Monroe Counties has 41,111 people. Thus, voters in the latter district have almost twice as much representation as those in the former. On the other hand, if Conecuh were moved to the district with Wilcox and Monroe, that district would have 58,873 people and the district comprising Butler and Covington would have 60,191.

As one last example, the district of Autauga, Chilton, and Shelby Counties has a population of 76,564

[23] The Senate districts under the Crawford-Webb Act and the population of each is set forth at R. 129 and 167.

while the adjoining district of Bibb and Perry Counties has 31,715. Thus, the disparity in representation is approximately 2½ to 1. If Autauga County were moved to the latter district, this district would have a population of 50,454. Chilton and Shelby Counties would then form a district with 57,825 people.

The State of Alabama has suggested no justification for these discrepancies. More of them are based on the limitation of one Senator to a county. The only possible explanation is that the legislature apparently desired to correct only the worst of the inequalities which previously existed (see pp. 11–12, 37–38 above). However, serious inequalities remain and, since they have no intelligible basis, the apportionment violates the Fourteenth Amendment under the principles stated earlier.

2. The apportionment under the Crawford-Webb Act would also be unconstitutional, we submit, for the same reason as the "67-Senator Amendment"—the interests advanced by the departure from *per capita* equality do not furnish a reasonable basis for the gross discrimination and utter disregard for the principle of majority rule.

In the Senate the people of every county, however populous, are limited to a single representative. Jefferson County with 20 percent of the total population of Alabama chooses only three percent of the Senate. Mobile County with 10 percent of the total population also chooses only three percent. A voter in the *average* senatorial district has three times the representation of a voter in Mobile County and six times the

representation of a voter in Jefferson. There is similar, albeit less severe, discrimination against Montgomery, Madison and Tuscaloosa Counties. A majority of the senators would come from districts containing 27.6 percent of the people.

In the House, as explained above, the counties would be assigned additional representatives on the basis of population, not in direct proportion but within increasingly wider brackets for each additional representative. The number of people per representative in the middle of the second bracket is 33,750; the number per representative in the middle of the third bracket is 40,000; the number per representative in the middle of the fourth bracket is 56,250 (however, Montgomery would be the only county in this bracket and it would have 42,303 people per representative); the number of people per representative in the middle of the fifth bracket is 75,000 (however Mobile would be the only county in this bracket and it would have 52,384 people per representative); and the number of people per county at the bottom of the last bracket would be 50,000 (however, Jefferson County would be the only county in this bracket and it would have 52,905 people per representative). Thus, there would be more population per representation as counties were more populous. The consequence is that seven counties, all in the second bracket (*i.e.*, having two representatives) would have twice the representation of Jefferson and Mobile Counties; and 12 counties in the second bracket and two in the third bracket would have over 1½ times the

representation of Jefferson and Mobile. A majority of the House would come from counties containing as little as 37 percent of the people.

Thus, both branches of the legislature are deliberately constituted by rules that discriminate against voters who live in the more populous counties. Judged simply as discrimination against urban voters in favor of rural voters, which is all that appears on the face of the legislation, the Crawford-Webb apportionment is manifestly unconstitutional. The equal protection clause forbids a State to create favored political classes on the basis of race, religion, occupation, or economic status. Where a man lives, like the number of his neighbors, is irrelevant to any permissible purpose of electoral policy. See our briefs in the Maryland (pp. 39–46) and New York cases (pp. 14–33).

It may be argued that what appears to be only a calculated effort to deprive the residents of populous counties of the right of majority rule is really directed at achieving such objectives as geographical diffusion of political influence, preserving small and compact constituencies and providing some representation to every locality which may have unique local interests. In our Maryland brief (pp. 44–50, 82–90), we have discussed the role of these factors in legislative apportionment. The short of the matter is that even if they may support some deviations from *per capita* equality, they will not justify such gross inequalities and rule by such small minorities as would be created by the Crawford-Webb Act.

IV

THE TEMPORARY APPORTIONMENT ORDERED BY THE DISTRICT COURT AS INTERIM RELIEF IS NOT AN ABUSE OF DISCRETION

Upon finding that the existing apportionment and the alternatives advanced by the Alabama legislature were all unconstitutional, the district court was required to provide appropriate relief. Under other circumstances it might have entered only a declaratory judgment or an injunction forbidding the election officials from conducting the next election according to the invalid apportionment, leaving the legislature an opportunity to provide an acceptable substitute. See pp. 46–47, *infra*. The court below had already tried that course but the legislature chosen under the old apportionment proved unable or unwilling to reapportion itself in accordance with the Fourteenth Amendment. Accordingly, the court directed a judicial apportionment with the allocation of seats in the Senate based upon the Crawford-Webb Act and the allocation in the House based upon the proposed constitutional amendment. Jurisdiction was reserved against the possibility that even the legislature so chosen would not adopt a proper apportionment. The cross-appellants challenge the interim order on the ground that it does not immediately vindicate their full constitutional rights.

The formulation of a decree in equity calls for the exercise of discretion, and a district has broad discretion especially in cases involving important public interest. *Virginian Ry. Co.* v. *System Federation No.*

40, 300 U.S. 515, 552; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661, 670. See also, *International Boxing Club* v. *United States*, 358 U.S. 242, 253; *International Salt Co.* v. *United States*, 332 U.S. 392, 400–401. While there can be little doubt of the power of a court to fashion an affirmative remedy in an apportionment case,[24] the timing and formulation of such a decree calls for balancing competing considerations: The goal, which must be attained, is to secure the plaintiffs' constitutional rights. Joined with them is a strong public interest in equitable apportionment, both for its own sake and as a means of revitalizing State government. On the other hand, the district court must be mindful of the dangers of intruding into local self-government. Apportionment also involves a wide range of choices suited to the political not the judicial branches of government. Any reapportionment ordered by a court is a poor substitute for one of the people's own making.

Mindful of these considerations the federal district courts, as well as the State courts, have uniformly endeavored to encourage the State legislatures to reapportion themselves without judicial intervention. Many courts, including the court below (R. 57–58, 140–141), have delayed deciding the issue of the constitu-

[24] *Moss* v. *Burkhart*, U.S. D.C., W.D. Okla., decided July 17, 1963; *Sobel* v. *Adams*, 208 F. Supp. 316, 318 (S.D. Fla.); *Toombs* v. *Fortson*, U.S. D.C., N.D. Ga., decided September 5, 1962. See also *Fortner* v. *Barnett*, No. 59,965, Chancery Court, First Judicial District, Hinds County, Mississippi; *Stevens* v. *Faubus*, 354 S.W. 2d 707, 711 (Ark. Sup. Ct.).

tionality of the apportionment in order to give the legislature time to act. *Sincock* v. *Terry*, 207 F. Supp. 205, 207 (D. Del.); *Lein* v. *Sathre*, 205 F. Supp. 536, 540 (D. N.D.); *Magraw* v. *Donovan*, 163 F. Supp. 184, 187–188 (D. Minn.); *Mikell* v. *Rousseau*, 183 A. 2d 817, 823 (Vt. Sup. Ct.); *Asbury Park Press, Inc.* v. *Wooley*, 33 N.J. 1, 161 A. 2d 705, 714–715; *In re Legislative Reapportionment*, 374 P. 2d 66, 71–72 (Colo. Sup. Ct.); *Butcher* v. *Trimarchi*, 28 Pa. Dist. & County Rep. 2d 537, 542. Other courts have delayed entering a decree after ruling that an apportionment was unconstitutional until the legislature should have had time to make a new apportionment satisfying the requirements of equal protection. *Sobel* v. *Adams*, 208 F. Supp. 316, 318 (S.D. Fla.); *Toombs* v. *Fortson*, 205 F. Supp. 248, 259, and unreported opinion, September 5, 1962, U.S. D.C. (N.D. Ga.); *Baker* v. *Carr*, 206 F. Supp. 341, 349, 350–351 (M.D. Tenn.); *Moss* v. *Burkhart*, 207 F. Supp. 885, 894, 898–899 (W.D. Okla.); *League of Nebraska Municipalities* v. *Marsh*, 209 F. Supp. 189, 195–196 (D. Neb.); *Mann* v. *Davis*, 213 F. Supp. 577, 585–586 (E.D. Va.), pending on appeal, No. 69, this Term; *Thigpen* v. *Meyers*, 211 F. Supp. 826, 832 (W.D. Wash.), pending on appeal, No. 381, this Term; *Sincock* v. *Duffy*, 215 F. Supp. 169, 191–192 (D. Del.), pending on appeal, No. 307, this Term; *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 412, 180 A. 2d 656, 670–671; *Maryland Committee for Fair Representation* v. *Tawes*, Circuit Court, Anne Arundel County, Maryland, decided May 24, 1962; *Harris* v. *Shanahan*, District Court, Shawnee County,

Kansas, decided July 26, 1962; *Fortner* v. *Barnett*, No. 59,965, Chancery Court, First Judicial District, Hinds County, Mississippi. The time given the legislature to act has, where necessary, even been extended past the date of the next election. *League of Nebraska Municipalities* v. *Marsh, supra*, 209 F. Supp. at 195–196; *Toombs* v. *Fortson*, U.S. D.C., N.D. Ga., decided October 19, 1962.

In the present case the legislature's inadequate response compelled the court to take further action, but the necessity did not lessen the importance of minimizing judicial intervention into the political processes of local self-government. Accordingly, the court adopted the provisions of the proposed constitutional amendment for the apportionment of the House and the provisions of the Crawford-Webb Act for the apportionment of the Senate, making the court-ordered apportionment effective until the legislature should reapportion itself. The rationale is well-stated in the court's own opinion (R. 154–155):

> The duty to reapportion rests on the Legislature. This Court acts in the matter reluctantly because of the long continued default and total inability of the Legislature to reapportion itself. Even under such circumstances, we think that a federal court, in the light of its delicate relationship with a state legislature, should, so far as is possible, accept such parts of the Acts of the Legislature as have any merit in framing the order of the Court. For the purpose of the order of the Court to release the strangle hold on the Legislature and permit it to reapportion itself, such parts of the Acts of

the Legislature need not meet the standard of constitutionality required of a permanent Act of reapportionment.

The cross-appellants complain that the decree does not at once secure their full constitutional rights and that it may be ineffective to break the stranglehold of minority interests upon the legislature. But the court below, which was closer to local conditions than any other federal tribunal, believed that the remedy would lead to a new and equitable apportionment (R. 153–155), and the remedy chosen had the great advantage that it was based entirely upon the work of the Alabama legislature. While plaintiffs' full interests were not immediately secured, a more precipitate course of action threatened unnecessary intrusion into local political processes and potential conflict with State authorities; for the only alternatives were election at large or a judicial apportionment. Although additional steps would be required if the interim remedy proved insufficient, the district court was not required to rush into the assumption of legislative responsibilities and invite conflict with the State.

Furthermore, the decree is not a final measure. The district court reserved jurisdiction, stating that if the legislature did not reapportion itself the court

would enter a decree securing plaintiffs' full rights under the Fourteenth Amendment (R. 156).[25] The opinion it expressed concerning the constitutionality of the Crawford-Webb apportionment of the House of Representatives (R. 153) is a dictum which apparently had no effect upon the choice of an interim remedy and which will be open for consideration if the necessity for further judicial action should arise.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the district court should be affirmed.

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OCTOBER 1963.

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[25] The decree does say that the court's apportionment will remain in effect until the legislature reapportions itself consistent with the Fourteenth Amendment (R. 188). However, the opinion also states expressly that the decree is intended to be temporary and that it does not meet the full requirements of the Constitution (R. 154–156). The court retained jurisdiction "for the purpose of issuing any and all additional orders that may become necessary or appropriate in the judgment of this Court" (R. 190), and stated that it would use this power to remedy the violation of federal constitutional rights if the legislature did not act (R. 156). When read together, these provisions mean that the apportionment specified in the decree should terminate as soon as the legislature provides a constitutional apportionment and that, in default thereof, the court may grant further relief.

APPENDIX

Article IV, Section 50, of the 1901 Alabama Constitution provides:

> Sec. 50. The legislature shall consist of not more than thirty-five senators, and not more than one hundred and five members of the house of representatives, to be apportioned among the several districts and counties, as prescribed in this Constitution; provided that in addition to the above number of representatives, each new county hereafter created shall be entitled to one representative.

Article IX, Sections 197–201, of the 1901 Alabama Constitution provides:

> Sec. 197. The whole number of senators shall be not less than one-fourth or more than one-third of the whole number of representatives.
>
> Sec. 198. The house of representatives shall consist of not more than one hundred and five members, unless new counties shall be created, in which event each new county shall be entitled to one representative. The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken.
>
> Sec. 199. It shall be the duty of the legislature at its first session after the taking of the decennial census of the United States in the year nineteen hundred and ten, and after each

subsequent decennial census, to fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them, respectively; provided, that each county shall be entitled to at least one representative.

Sec. 200. It shall be the duty of the legislature at its first session after taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided, that counties created after the next preceding apportioning session of the legislature may be attached to senatorial districts. No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other.

Sec. 201. Should any decennial census of the United States not be taken, or if when taken, the same, as to this state, be not full and satisfactory, the legislature shall have the power at its first session after the time shall have elapsed for the taking of said census, to provide for an enumeration of all the inhabitants of this state, upon which it shall be the duty of the legislature to make the apportionment of representatives and senators as provided for in this article.

Article XVIII, Section 284, of the 1901 Alabama Constitution provides in pertinent part:

Sec. 284. * * * Representation in the legislature shall be based upon population, and such

basis of representation shall not be changed by constitutional amendments.

Sections 1 and 2 of 32 Alabama Code (1958) provide:

> *Section 1. House of representatives.*—The house of representatives of the legislature consists of one hundred and six members, distributed among the several counties as follows: The counties of Autauga, Baldwin, Bibb, Blount, Cherokee, Chilton, Choctaw, Clay, Cleburne, Coffee, Colbert, Conecuh, Coosa, Covington, Crenshaw, Cullman, Dale, DeKalb, Escambia, Fayette, Franklin, Geneva, Greene, Houston, Lamar, Lawrence, Limestone, Macon, Marion, Marshall, Monroe, Pickens, Randolph, Shelby, St. Clair, Washington, and Winston shall each elect one representative. The counties of Barbour, Bullock, Butler, Calhoun, Chambers, Clarke, Elmore, Etowah, Hale, Henry, Jackson, Lauderdale, Lee, Lowndes, Madison, Marengo, Morgan, Perry, Pike, Russell, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker and Wilcox shall each elect two representatives. The counties of Dallas and Mobile shall each elect three representatives. The county of Montgomery shall elect four representatives; and the county of Jefferson shall elect seven representatives.
>
> *Section 2. Senatorial districts.*—The senate of the legislature shall consist of thirty-five members, and the state is divided into thirty-five senatorial districts, as follows: First, Lauderdale and Limestone; second, Lawrence and Morgan; third, Blount, Cullman and Winston; fourth, Madison; fifth, Jackson and Marshall; sixth, Etowah and St. Clair; seventh, Calhoun; eighth, Talladega; ninth, Chambers and Randolph; tenth, Tallapoosa and Elmore; eleventh, Tuscaloosa; twelfth, Fayette, Lamar and Walker; thirteenth, Jefferson; fourteenth, Pick-

ens and Sumter; fifteenth, Autauga, Chilton and Shelby; sixteenth, Lowndes; seventeenth, Butler, Conecuh, and Covington; eighteenth, Bibb and Perry; nineteenth, Choctaw, Clarke and Washington; twentieth, Marengo; twenty-first, Baldwin, Escambia and Monroe; twenty-second, Wilcox; twenty-third, Dale and Geneva; twenty-fourth, Barbour; twenty-fifth, Coffee, Crenshaw, and Pike; twenty-sixth, Bullock and Macon; twenty-seventh, Lee and Russell; twenty-eighth, Montgomery; twenty-ninth, Cherokee and De Kalb; thirtieth, Dallas; thirty-first, Colbert, Franklin and Marion; thirty-second, Greene and Hale; thirty-third, Mobile; thirty-fourth, Clay, Cleburne and Coosa; thirty-fifth, Henry and Houston.

Proposed Constitutional Amendment No. 1 of 1962, Alabama Senate Bill No. 29, Special Session, 1962 (the so-called "67-Senator Amendment") provides (R. 157–159):

> *Enrolled*, An Act, Proposing an amendment to the Constitution of Alabama relating to legislative apportionment.
>
> BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:
>
> *Section 1.* The following amendment to the Constitution of Alabama 1901 is proposed and shall become valid as a part thereof when approved and proclaimed as prescribed by law: *Proposed Amendment 1.*. The legislature of Alabama shall consist of a senator for each county and 106 members of the house of representatives, to be apportioned among the several counties as herein prescribed; provided, that in addition to the above number of representatives each new county hereafter created shall be entitled to at least one representative. 2. At the general election in 1966, and every four years thereafter, a senator shall be elected by the

qualified electors of each county in the state. 3. At the general election in 1966, and every four years thereafter, until the house of representatives is reapportioned as herein provided, the qualified electors of each county in the state shall elect such number of representatives as may be apportioned to the county as follows: The county of Jefferson shall have and elect seventeen representatives; the county of Mobile shall have and elect eight representatives; the county of Montgomery shall have, and elect four representatives; the counties of Calhoun, Etowah, Madison and Tuscaloosa shall each have and elect three representatives; the counties of Dallas, Lauderdale, Morgan, Talladega and Walker shall each have and elect two representatives; and the remaining counties of the state shall each have and elect one representative. 4. On the first day, or within one week thereafter, of the regular session of the legislature in 1971, and every fifth regular session thereafter, the clerk of the house of representatives shall transmit to the secretary of state a statement showing the whole number of persons in each county under the most recent decennial census of the United States, and the number of representatives to which each county will be entitled under an apportionment of the then existing number of representatives by the method known as the method of equal proportions, no county to receive less than one representative. 5. In Section 284 of this Constitution as amended, strike out the last sentence thereof and insert the following sentence: Representation in the house of representatives of the legislature shall be based upon population. 6. Article IX (sections 197–203) of this Constitution is hereby expressly repealed.

Section 2. An election upon the proposed amendment is ordered to be held on the date of the general election next succeeding the final adjournment of the current session of the Legis-

lature. The election shall be held in accordance with the provisions of Sections 284 and 285 of the Constitution of Alabama, as amended, and Chapter 1, Article 18, Title 17 of the Code of Alabama 1940.

Section 3. Notice of the election and of the proposed amendment shall be given by proclamation of the Governor, which proclamation shall be published once a week for four successive weeks next preceding the day appointed for the election in a newspaper in each county of the State. In every county in which no newspaper is published, a copy of the notice shall be posted at each courthouse and post office.

The Alabama Reapportionment Act of 1962, Alabama House Bill No. 59, Special Session, 1962 (the "Crawford-Webb Act") provides (R. 160–162):

Enrolled, An Act, To fix the number of senators and representatives in the legislature, divide the state into senatorial districts, and apportion the senators and representatives among the several districts and counties

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. The senate of the legislature shall be composed of 35 senators representing 35 senatorial districts, each district to elect one senator and no more.

Section 2. The state is hereby divided into 35 senatorial districts as follows:

First, the counties of Lauderdale and Limestone; second, the counties of Lawrence and Morgan; third, the counties of Cullman and Winston; fourth, the county of Madison; fifth, the counties of Jackson and Marshall; sixth, the county of Etowah; seventh, the county of Calhoun; eighth, the county of Talladega; ninth, the counties of Randolph and Chambers;

tenth, the counties of Elmore and Tallapoosa; eleventh, the county of Tuscaloosa; twelfth, the counties of Fayette and Walker; thirteenth, the county of Jefferson; fourteenth, the counties of Pickens and Lamar; fifteenth, the counties of Autauga, Chilton and Shelby; sixteenth, the counties of Monroe and Wilcox; seventeenth, the counties of Butler, Covington and Conecuh; eighteenth, the counties of Bibb and Perry; nineteenth, the counties of Clarke, Choctaw and Washington; twentieth, the counties of Marengo and Sumter; twenty-first, the counties of Baldwin and Escambia; twenty-second, the counties of Blount and St. Clair; twenty-third, the counties of Dale and Geneva; twenty-fourth, the counties of Barbour and Pike; twenty-fifth, the counties of Coffee and Crenshaw; twenty-sixth, the counties of Bullock and Macon; twenty-seventh, the counties of Lee and Russell; twenty-eighth, the county of Montgomery; twenty-ninth, the counties of Cherokee and DeKalb; thirtieth, the counties of Dallas and Lowndes; thirty-first, the counties of Colbert, Franklin and Marion; thirty-second, the counties of Greene and Hale; thirty-third, the county of Mobile; thirty-fourth, the counties of Coosa, Clay and Cleburne; thirty-fifth, the counties of Henry and Houston.

In districts consisting of more than one county, the senators shall not be elected for more than one term consecutively from any one county in the district, but shall reside in and be elected alternately and in turn from each of the counties within such district. The first senator to be elected in such districts shall reside in the county having the largest population, except where that county had the last preceding senator. It is provided, however, that any senator in office on the effective date of this enactment shall be eligible to succeed

himself as a member of the Senate, any other provision of this paragraph to the contrary notwithstanding.

Section 3. The house of representatives of the legislature shall consist of 106 members distributed among the several counties of the state as follows:

The county of Jefferson shall have and elect 12, the county of Mobile 6, and the county of Montgomery 4; the counties of Calhoun, Etowah, Madison and Tuscaloosa 3 each; the counties of Baldwin, Colbert, Cullman, Dallas, Houston, Lauderdale, Lee, Marshall, Morgan, Russell, Talladega and Walker 2 each; and the remaining counties 1 each.

Section 4. This Act shall take effect for the election of senators and representatives at the general election to be held in November 1966, and shall be effective thereafter until the legislature is reapportioned according to law.

Section 5. The provisions of this Act are severable. If any part of this Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.